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No. 2439

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK M. PINDEL,

Petitioner,

vs.

NORMAN J. HOLGATE, as trustee of the estate of Frank M. Pindel, bankrupt, and the BANK OF NEZPERCE,

Respondents.

In the Matter of FRANK M. PINDEL, Bankrupt.

ADDITIONAL AUTHORITIES ON BEHALF OF PETITIONER.

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PERNAU PUBLISHING COMPANY

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In the haste of preparation of the reply brief filed by the petitioner herein a few very important authorities were overlooked and we file this brief to bring these additional authorities directly to the attention of the Court.

One of the main contentions on the part of the respondents is that the claim of the petitioner (which is urged as a setoff to the claim filed against

his estate in bankruptcy by the Bank of Nezperce) is barred by the Statute of Limitations. The party urging this setoff is the bankrupt himself, Frank M. Pindel, and it is conceded that this setoff was not barred by limitation at the time the bankruptcy proceedings were filed. (The action against the bankrupt in which the wrongful attachment was issued was commenced June 27th, 1908, and the bankruptcy proceedings were filed February 14th, 1910. Section 4054 of the Idaho Code provides a three year limitation for actions of this character.)

As the bankrupt was in a position to urge his claim for wrongful attachment at the time the bankruptcy proceedings were commenced he comes within the rule which is stated in

Remington on Bankruptcy, Sec. 1791.

> "Suit may be commenced by the trustee upon any action that was not barred by limitation at the beginning of the bankruptcy, and may be so commenced at any time within the two years after the closing of the estate, notwithstanding the State statute of limitations may bar the action before the two years have expired. In short, the Act creates a new statute of limitations, except as to actions already barred when the bankruptcy proceedings were instituted."

The respondents also contend that the ex-sheriff had a right to make a sale of the personal property seized by him under a writ of execution *issued after*

his term of office had expired. That this is not the case plainly appears from

Rorer, Judicial Sales, 2 Ed., Sec. 888, page 343.

> "A levy and sale made after the official term of the officer expires and when his official power has ceased, or after his removal from office, is simply void. But otherwise, if the writ be levied by him before his office ceases in either manner above named, and only the sale be made after the term of his office."

A claim for unliquidated damages for a wrongful attachment, such as is urged by the petitioner in this case, is in all its essential features similar to an ordinary claim for conversion. It arises out of the unlawful seizure of personal property, that is the taking and detention of personal property which belongs to the bankrupt, without legal cause. The taking of this property by the agent of the Bank of Nezperce after a void execution sale made to it by an ex-sheriff having no authority so to do constitutes a case of conversion pure and simple.

A claim for conversion has always been proveable in bankruptcy, even though the damages are unliquidated.

Collier Bankruptcy, 8th Ed. page 717, referring to Sec. 63 B.

> "Sub-division 'B' permits the liquidation and subsequent proof and allowance of an unliquidated claim against the bankrupt. The law of 1867 permitted the liquidation of damages for conversion only, that, as has been

shown, was (aside from debts grounded in fraud and embezzlement) the only tort liability provable. The words of the present law are much broader and seem to be taken from R. S. Sec. 5068, which regulated the liquidation of contingent debts and contingent liabilities."

Also

Loveland Bankruptcy, 4th Ed. Section 325.

"It is now well settled that where a claim arises ex delicto, but is also of such character as to constitute a claim on the theory of a quasi contract, the debt is provable in bankruptcy under Section 63, Clause 4. The right to prove such claims is not waived by suing to recover damages for the torts."

Such a claim, being provable in bankruptcy, the bankrupt naturally can make avail of it as a setoff against the ordinary contract claims of his creditors.

In re Harper, 175 Fed. 412.

The validity of the petitioner's claim for wrongful attachment is not affected by subsequent acts of his attaching creditor. His attorneys here claim that a second valid attachment was levied after the first wrongful attachment and that a judgment was finally secured in the action. Neither of these things can cure the tort of the attaching creditor in levying his first wrongful attachment as appears from a multitude of cases cited in the Century Digest under the head of "Attachment" in Sections 1351 and 1352.

The petitioner here contends that the findings of fact made by the referee in the opinion filed by him, which was incorporated in the transcript, are in no particular reversed by the decision of the Judge of the District Court. The Judge of the District Court differed from the referee merely in his conclusions of law from the facts found.

However, if the opposite were the case we think that the findings of the referee on a question of fact should prevail over those made by the Judge of the District Court, under the authority of the case of

> Smith Pine Co. v. Trust Company (C. C. A. 5th), 141 Fed. 802.

In that case a finding made by the referee was reversed by the District Court and the Circuit Court of Appeals held that as the referee had personally heard the evidence the finding made by him should prevail. The Court says:

> "The bearing of the witness, his appearance, his general interest and deportment are, in many cases, as important in determining the truth of evidence, as the words he uses, and the Court should not always set aside findings which do not conform to the written evidence."

Respectfully submitted,

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